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In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT CRAIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

AUTHORITIES CITED

Cases

Other Authorities

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Robert Craig, prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming (with one dissent) the conviction in this cause is not officially reported, but is printed in the Appendix. (App. D, pgs. App. 59-151)

JURISDICTION

The Opinion of the United States Court of Appeals was filed on December 12, 1977. (App. D, pgs. App. 59-151) A Petition for Rehearing timely made was denied on March 21, 1978. (App. E, pg. App. 152) This Petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Do the principles of common law in light of reason and experience dictate the recognition of a federal common law legislative privilege to be applied in federal criminal prosecutions against elected State legislators?

2. Do the Federal Rules of Evidence command that, a privilege once having been recognized, will be generally applied both criminally as well as civilly?

3. Does this case reflect a growing "pernicious" trend in the extension of federal jurisdiction beyond the intent of Congress when it enacted the various provisions of the Criminal Code, here the mail fraud statute and the federal Travel Act?

4. Were the mailings and the travel significant in, and material to, the effectuating of the scheme?

5. Were the tapes of "intercepted" conversations properly admitted as primary evidence, as "consensual", under Title 18 U.S.C. § 2511(2)(c)?

6. When a defendant defends at a criminal trial in reliance on then-extant authority as to the law governing his position, does he do so at the risk that the law will change after trial, and be applied retroactively to his disadvantage?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 12, Illinois State Constitution of 1970; Smith-Hurd Illinois Annotated Statutes.

". . . A member (of the General Assembly) shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings."

Amendment V, Constitution of the United States.

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, Constitution of the United States.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 371.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 101.

Title 18, United States Code, Section 1341.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail accord-

ing to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18 U.S.C., Section 1952.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Title 18, United States Code, Section 2511.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was ob-

tained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Rule 501, Federal Rules of Evidence.

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be in-

terpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Rule 1101 (b) & (c), Federal Rules of Evidence.

Rule 1101. Applicability of Rules

* * *

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

STATEMENT OF THE CASE

In December, 1974, this petitioner was charged under fourteen counts of violation of the Federal Criminal Code (mail fraud statute, 18 U.S.C. §1341, eleven counts; 18 U.S.C. §1952 travel act, 2 counts; and 18 U.S.C. §371, conspiracy to violation the mail fraud statute, one count), together with 14 other persons who were charged in various of those counts, but all under the conspiracy count. The defendants included seven former or present members of the Illinois General Assembly, all of whom went to trial save one; an employee of the Illinois Secretary of State, who went to trial; and seven members of the Ready-Mix (cement) industry, one of whom went to trial and was acquitted. Pleas of guilty were entered by those not electing trial, and they, for the most part, were government witnesses as was another legislator and various in-

dustry members (as well as two industry corporations), who received informal immunity.[1]

> "* * * Counts Two through Twelve charged the substantive crime of mail fraud in violation of 18 U.S.C. § 1341, alleging that the defendants and unindicted co-conspirators devised a scheme and artifice to 'defraud the citizens of the State of Illinois of their right to the loyal, faithful, and honest services of those defendants and co-conspirators . . . who were public officers and members of the Illinois General Assembly . . . in the performance of acts related to their official duties and functions.' Counts Two through Twelve also alleged that the defendants devised a scheme to 'defraud the State of Illinois, its citizens, its public officers, its public employees and the loyal, faithful and honest members of the Illinois General Assembly of their right to have the State's legislative business conducted honestly and impartially, and in accordance with the laws of Illinois, free from deceit, corruption, misconduct, conflict of interest, bribery and fraud, and willful concealment thereof.' Each of Counts Two through Twelve alleged that the various defendants and co-schemers caused a specific mailing to be made for the purposes of executing the scheme. Each of Counts Two through Twelve are also alleged to be overt acts of the conspiracy charged in Count One. Counts Thirteen and Fourteen charged a violation of 18 U.S.C. § 1951 [sic: 1952], alleging that the various defendants caused an individual to travel in interstate commerce with intent to promote an unlawful activity, namely bribery in violation of *Illinois Revised Statutes*, Chapter 38, § 33-1." (App. 59-60)

Prior to trial, this petitioner moved (ultimately unsuccessfully) to dismiss the indictment and to ban evidence within the scope of the Speech or Debate Clauses of the United States Constitution and of the State of Illinois. He similarly moved in a cause, review of which is requested

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[1] The prosecutor's commitment letter, that they were in no danger of criminal proceedings, so long as they, and their officers, testified.

this date, under the title of *Markert and Craig* v. *United States*. The main opinions arose out of that case, and were made applicable to this.[2] One of the defendants, Kenneth Course (now deceased), was also charged separately for perjury before the Grand Jury in his testimony involving the subject matter of this case. Over objection that case was consolidated for trial with this cause.

Trial commenced on April 19, 1976, and concluded on June 25, 1976. During trial the decision of the United States Court of Appeals for the Seventh Circuit respecting an immunity, derived from or co-extensive with Speech or Debate, was extant. This petitioner did not testify in his own behalf on trial for fear that to do so would constitute a waiver of the immunity conferred by the first decision. Within two weeks of this trial's conclusion, after en banc hearing, that immunity was found nonexistent. On August 25, 1976, post trial motions were denied, and on October 29, 1976, this petitioner was sentenced to three years in the custody of the Attorney General, having been found guilty on all counts, and fined $5,000.00.

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[2] "This prosecution has resulted in two previous decisions by this court. *United States* v. *Craig*, 528 F.2d 773 (1976) (*Craig I*), and the *en banc* decision on rehearing reported at 537 F.2d 957 (1976), *cert. denied sub nom. Markert* v. *United States*, 425 U.S. 973 (1976) (*Craig II*), dealt with an asserted testimonial privilege of a state legislator in the context of a federal criminal prosecution. In this appeal defendants contend that *Craig* II should be re-examined, and that the district court's refusal to dismiss the indictment on the ground that Congress did not intend the federal criminal statutes involved in this case to be applicable to state legislators should be reversed.

"We recently rejected an identical contention in *United States* v. *Craig*, ... F.2d ..... (7th Cir. 1977) (Slip opinion, No. 76-2089, December 12, 1977, pp. 54-56), a case involving the same appellant Craig as this case, but based on a different prosecution. We also reject the contention here." (App. 51)

On Appeal, the judgment of conviction was affirmed (one Judge dissenting, principally on the ground that the mailings and interstate travel was not in furtherance of the scheme alleged in the indictment), on December 12, 1977. A Petition for Rehearing was denied on March 21, 1978. (App. 152).

Facts Relevant to this Petition

The basic scheme here involved is pedestrian. It concerns defendants and co-schemers in the ready-mix cement industry who, for obvious economic reasons, wanted to haul more by truckload of their product over Illinois highways than allowed by Illinois law. It concerns the introduction into the Assembly of a bill that would allow the increased tonnage.[3] It also concerns State legislators and senators. The first group (cement businessmen) agreed to raise a sum of money to be paid to the second group (legislators and senators) to aid the passing of the bill. The second group agreed to take it, with the understanding that it was given for their support.[4] Peter V. Pappas, an employee of the Secretary of State, and expert on this type of legislation, drafted the proposed bill, and approached the second group to elicit the support desired by the first group, through Pete Pappas, the unindicted legislator, who in turn approached this petitioner on the Democratic side of the House and who also made his entries into the Senate,

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[3] The bill itself is of little consequence. Many neighboring states were already allowing the increased weight. Nor was the sponsor of the Bill brought into the proceedings other than peripherally.

[4] Ironically, the moneys collected had to be given back because the governor vetoed the Bill. The immunized officers of one immunized corporation, and the "dealt-with" officers of another raised the money eventually paid.

through Carpentier, Pappas' close friend, and "dealt-with"[5] defendant in this cause.

The Mailings

The mailings which formed the basis for the convictions on Counts Two, Three, Four and Five were notices and agenda of the December, 1971 and January, 1972 meetings of the Motor Vehicle Laws Commission (MVLC) which were mailed at their own request to ready-mix industry representatives Connolly and McBride, two unindicted co-schemers. McBride and Connolly were present at the committee meetings and heard announced when the committee next met. Then they caused notices to be sent by mail to themselves with the same information. Moreover, the MVLC met on a regular basis and a key government witness testified that these notices are "not necessarily" received before the next meeting. (App. 133-4; 144-5)

Counts Six and Seven are duplicate letters sent to the members of the Northern Illinois Ready-Mix and Materials Association (NIRMMA). The letters simply informed the members of the association that dues would be suspended for three months because of the large reserves accumulated in NIRMMA's treasury.

During the NIRMMA annual convention in Miami Beach in February 1971, several members of the association, including Connolly, met to discuss the raising of the $50,000 bribe for the passage of the bill. Connolly suggested that the dues of the association members be suspended for a period of time to compensate partially those members contributing to the fund. On March 9, NIRMMA's board of directors moved to suspend the dues payments of members for three months to reduce the reserve monies of the association.

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[5] Agreement to enter plea of guilty and testify in exchange for clemency recommendation.

The $50,000 fund was not derived from funds of any of NIRMMA companies. The waiver extended to all members of the association whether or not their officers had contributed to the fund. Finally, the dues suspension was not rescinded with the return of the $50,000 fund to its contributors. (App. 134-5, 146)

The mailings which are the subject of Counts Eight and Nine are fraudulent expense vouchers perpetrated on NIRMMA's treasury. When the $40 per truck assessment of the NIRMMA members proved to be insufficient to raise the $50,000 bribe fund, the $3160 deficit was made up by co-schemers Wille and Moeller. To reimburse them for this outlay, false expense vouchers were submitted by Bernard Arequilla and Morris Lauwereins to Connolly of NIRMMA. The cash generated by these vouchers was turned over to Connolly who in turn reimbursed Wille and Moeller. (App. 136, 147, 148)

The mailings which were the subject of Counts Ten and Eleven consisted of bulletins mailed by two ready-mix industry associations, Northern Illinois Ready-Mix and Materials Association (NIRMMA) and Illinois Division-Midwest Ready-Mix Concrete Association (ID-MRCA), informing their members of Senate passage of H.B. 4176 and urging them to contact the Governor to sign the bill. The bulletin also urged its members to write the governor, concerning other legislation, in no way related to the "cement" bill. (App. 137, 149, 150)

The mailing that was the subject of Count Twelve concerned 5-$100 bills addressed to the defendant Walker, and mailed in an envelope not otherwise marked. Carpentier testified that in September 1972 he received $5000 in $100 bills from Pappas. He said that a few days later he had his wife type the addresses of nine senators on plain envelopes. He further testified that using the cash supplied by Pappas, he placed a $100 bill in each of eight envelopes and five in an envelope addressed to Walker and

that he then mailed these envelopes. Walker testified at the trial and denied that he was offered or received any money in connection with the legislation. (App. 138-9)

The Travel Counts

Counts Thirteen and Fourteen are respectively a trip from Chicago to Indianapolis and back again.

The Midwest Ready-Mix Concrete Association has both Illinois and Indiana divisions. The annual convention alternates between the two states. Lauwereins, an unindicted co-schemer, traveled from Chicago to Indianapolis to meet with members of the Illinois Division-Midwest Ready-Mix Concrete Association (ID-MRCA). He testified the purpose of his trip was to inform them of the $50,000 bribe and to seek their support in raising the money. When the ID-MRCA refused, Lauwereins returned to Chicago. (App. 141)

The Electronic Recordings

This petitioner was twice recorded by the government chief-witness, who was informally immunized in exchange for his testimony on this trial, and probation on another and separate charge against him. One of the recordings was in a cocktail lounge at the Conrad Hilton on September 27, 1973, before Pete Pappas had consummated his "deal" with the government, and again, on October 23, 1973, six days after the "deal" was consummated, at the Mansion View Hotel at Springfield.

The recording machinery was government provided, government operated, and government directed, the conversation to be aimed toward the subject matter of this lawsuit, and admissions of involvement. The tapes were never sealed, and the questionability of their integrity is expansively detailed in the Petition for Certiorari of *Peter* v. *Pappas* against the United States filed this day. We will, with the Court's indulgence adopt that statement.

REASONS FOR GRANTING THE WRIT

1. THE MAJORITY DECISION OF THE COURT BELOW IN ITS EN BANC, AND FINAL DECISION, HAS BEEN EXPRESSLY DISAVOWED BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT IN IN RE GRAND JURY PROCEEDINGS, 563 F. 2d 577.

2. THE DECISION OF THE COURT BELOW THAT NO PRIVILEGE EXISTS IN PRINCIPLES OF THE COMMON LAW FOR THE PROTECTION OF STATE LEGISLATORS FOR THEIR ACTS AS ELECTED REPRESENTATIVES—SO FAR AS CRIMINAL LIABILITY IS CONCERNED—IS CONTRARY TO, AND IN CONFLICT WITH, APPLICABLE DECISIONS OF THIS COURT.

3. THE DECISION HEREIN RECOGNIZING AN EVIDENTIARY PRIVILEGE, COMMENSURATE WITH LIABILITY, FINDS THE PRIVILEGE OPERATIVE CIVILLY, BUT INOPERATIVE CRIMINALLY, CONTRARY TO THE FEDERAL RULES OF EVIDENCE MAKING PRIVILEGE OPERATIVE AND APPLICABLE BOTH CIVILLY AND CRIMINALLY.

The decisions involving these points arose out of a case entitled *Markert and Craig* v. *United States of America*, Petition for Certiorari being prayed this day in a cause thus entitled. Since the reasoning in those decisions was made applicable to this cause in the Court below, we ask the Court to incorporate the expansion on the reasons made in that case as though set forth here.

4. THE DECISION BELOW EXTENDS FEDERAL JURISDICTION UNDER THE MAIL FRAUD STATUTE AND THE TRAVEL ACT BEYOND THE INTENT OF CONGRESS AND BEYOND THE INTERPRETATION OF PRIOR DECISIONS OF THIS COURT.

The vigorous dissenting opinion of Judge Swygert in this cause demonstrates that the main opinion has ignored this Court's warnings against extending the mail fraud statute (*United States* v. *Maze*, 414 U.S. 395) and the travel act (*Rewis* v. *United States*, 401 U.S. 808) into areas of criminality traditionally reserved to enforcement by the respective States (App. 127-151). That expansion and particularized dissent cannot be otherwise improved upon by us, and we would adopt it here as penetrating reasons why this Court should again make the restrictions of the use of those statutes emphatic.

Also, in his Petition for Certiorari filed this date, a co-defendant (*Jack Walker* v. *United States*) has prayed for this Court's relief under the mail fraud charges,[6] and we would adopt the reasons he advances.

Particularly Judge Swygert points out that the majority tested the mailings on a standard of whether they were "incidental to an essential part of the scheme" rather than requiring materiality to the execution of the scheme as demanded by this Court in *Maze*, (supra) 414 U.S. at 400, 401; *Kann* v. *United States*, 323 U.S. 88 and *Parr* v. *United States*, 363 U.S. 370 (App. 131).

In respect of the travel counts, Judge Swygert points, that while the primary aim of the act was at organized crime and persons residing in one state and operating in another, citing *Rewis*, 401 U.S. at 811, he concedes the

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[6] Senator Walker was not charged under the two counts charging violations of the travel act.

statute need not be precisely limited to that primary aim. He insists, however, that the interstate activity must be more than incidental, that the interstate activity must be significant. To illustrate that here it was far short of that requirement, he states:

> "There is no showing that the bribery scheme in any way depended on this one incident of interstate travel. That the members of the ID-MCRA were meeting in Indianapolis was completely fortuitous. The assistance of ID-MRCA was not even necessary or essential to the scheme as the $50,000 bribe was raised without its help.
>
> "This one trip cannot suffice to invoke jurisdiction under the travel act. The scheme involved here was outside the ambit of congressional concern—there is nothing about the scheme which suggests any reason why state police powers needed to be supplemented by the federal government. I would therefore hold that the interstate activity was 'so minimal, incidental, and fortuitous, and so peripheral' to the scheme, *Isaacs, supra* at 1146,[7] that it was error to submit these counts to the jury." (App. 141)

5. THE COURT SHOULD REVIEW THE DECISION OF THE COURT BELOW, BECAUSE IT REFLECTS GROWING INCURSIONS ON FOURTH AMENDMENT RIGHTS, NOT AS AUTHORIZED BY STATUTE OR REGULATION.

It seems recognized that, whereever possible, federal prosecutors are retreating ever farther from the exacting—and reviewable—standards of Title III eavesdropping (Title 18 U.S.C. §2518) and resorting to "consensual" electronic surveillance, relying on Title 18 U.S.C. §2511 (2)(c).

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[7] *United States* v. *Isaacs*, 7 Cir., 493 F.2d 1124, cert. den. 417 U.S. 976.

> "[A substantial minority of the Commission believes that these trends raise the possibility that Federal law enforcement authorities may be shifting from court-authorized to consensual surveillances for the purpose of avoiding the legal safeguards inherent in Title III. This shift from court approved to unregulated consensual surveillance is alarming.]" *Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (NWC Report, April 30, 1976)

In his Petition for Certiorari filed this date (*Peter V. Pappas* v. *United States*), Mr. Pappas a co-defendant in the trial of this cause has developed in depth the abuses sanctioned by the Court below in the *use* of "consensual" tapes. With this Court's indulgence, we would adopt that argument in its entirety.

But we must add another impediment to the extended—and critical—use of such evidence against this Petitioner. We submit that §2511(2)(c) does not authorize this type of evidence at all.

Section 2511 is essentially a criminal statute defining severe sanctions for its violation. Sub-section (2) thereof merely excepts certain defined actions from the operation of those criminal sanctions.

Section 2511 reads in pertinent part so far as the taping of this petitioner is concerned:

> "(1) Except as otherwise specifically provided in this chapter any person who—
>
> "(a) willfully *interprets*, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> "(b) willfully *uses*, endeavors to use, or procures any other person to use or endeavor to use

> any electronic, mechanical, or other device to intercept any oral communication when—
>
> • • •
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both." (our emphasis)

The Section on which the Court below relies (Section 2511(2)(c)) reads as follows:

> "(c) It shall not be unlawful under this chapter for a person acting under color of law to *intercept* a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interpretation." (our emphasis).

The Court will note that subsection (1) of the statute requires specific exceptions: "Except as otherwise *specifically* provided". The Court will also note that subsection (2)(c) specifically exempts interception, but it neither exempts nor excepts *use* of that interception. Title 18, U.S.C. §2511(1)(b) defines two crimes, subparagraph (a) proscribing interception, subparagraph (b) proscribing *use* of that interception. Subsection (b) has not been excepted, specifically or non-specifically by Subsection (2)(c).

This can't be countenanced as any oversight. Under subsection (2), the Congress carefully excepted *use* under subparagraph (a) and subparagraph (b); and subparagraph (3) makes specific provision for *reception* into *evidence* in a trial under certain circumstances. No oversight of Congress can be ascribed impliedly permitting the *use* under subsection (2)(c) of the recordings allegedly made of Craig on the ground that Pete Pappas was operating "under color of law". Such *use*, except as otherwise "specifically provided," is itself a crime denounced by Section 2511.

6. SUCCESSIVE DECISIONS, THE FIRST OF WHICH ACCORDS A SUBSTANTIAL RIGHT SUBJECT TO WAIVER ON WHICH DECISION A DEFENDANT RELIES IN FORMULATING HIS DEFENSE, CANNOT BE TAKEN AWAY FROM HIM BY A SECOND DECISION THAT OBLITERATES THE RIGHT AND NULLIFIES HIS AVOIDANCE OF WAIVER WITHOUT VIOLATING DUE PROCESS.

This indictment was simultaneously returned with *United States* v. *Craig*, 528 F.2d 773.[8] That case held that the State prohibition relative to Speech or Debate to be valid, but waivable. After this initial decision and while rehearing was under consideration by an *en banc* Court, this petitioner objected to going to trial pending a final ruling on Speech or Debate. (He was a codefendant in *U.S.* v. *Craig*) Notwithstanding this objection, the government pressed for trial and the trial court acquisced.

With the law then extant that an active participation in the trial would constitute waiver of his right to rely upon Speech or Debate by taking the witness stand as Markert was declared to have done by the Seventh Circuit in speaking to the investigators and testifying before the Grand Jury, he chose to remain passive. The position of this petitioner was clearly made. (Tr. 1030-1; 1534-1543)

After the finding of "guilty", the position of the Seventh Circuit, sitting *en banc*, changed to a determination that there was no privilege, so there could be no waiver. When he made his complaint that the case was defended by him on the basis of then-existing law, the reviewing court held:

> "Craig further argues that he was denied a fair trial when he based his defense on the testimonial

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[8] Cert. den. sub nom *Markert* v. *U.S.*, 425 U.S. 973, also see Petition for Certiorari filed this date, sub nom *Markert and Craig* v. *United States*.

> privilege enunciated in *Craig I*. To avoid a possible waiver of that privilege, Craig did not take the witness stand. The *en banc Craig* decision (*Craig II*), rendered after the verdict in the instant case, served to emasculate the defense based upon a state legislator's speech or debate immunity. Craig asserts that had he known prior to trial that it would later be determined that there was nothing he could waive under the *en banc* decision, his defense would have been more aggressive. We fail to see how Craig's defense was prejudiced by an after-trial change in the viability of the legal theory of this defense. Craig's decision to rely on the earlier panel opinion was a strategy decision which we are not inclined to review in the absence of any showing of prejudice." (App. 115)

We perceive no distinction between a defendant being put to trial without knowledge—and without basis for advice—of the state of the law upon which his conviction, if secured, will be reviewed, and the failure to advise him of the charges against him and his right to counsel.

No "strategy" decision can be determined in a vacuum. No more could the Seventh Circuit predicate the decision we seek here to review on what this Court *may* ultimately hold.

"Fundamental fairness" requires, *at the very least*, that the petitioner, Craig, should not have been forced to trial during the interim between the two conflicting decisions.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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